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In the

Supreme Court of the United States

October Term, 1970

No. 832

Alexander J. Salerno and William Valentine,

Petitioners,

—against—

Bowie Kuhn, individually and as the Commissioner of Baseball,

Respondent,

American League of Professional Baseball Clubs, an unincorporated association, Joseph E. Cronin individually and as President of the American League of Professional Baseball Clubs, and Paul Porter,

Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York (App. A of Petition) is reported at 310 F. Supp. 729 (1969). The opinion of the Court of Appeals for the Second Circuit (App. B of Petition) is reported at 429 F. 2d 1003 (1970).

Jurisdiction

The assertion of jurisdictional requisites is set forth in the Petition at page 2.

Questions Presented

1. Does the District Court have jurisdiction over the subject matter of an action brought under the federal antitrust laws by two former American League baseball umpires alleging wrongful discharge and boycott?

2. Does the complaint state a claim against respondent Kuhn under the federal antitrust laws when it fails to demonstrate a causal connection between asserted wrongful discharge and alleged antitrust violations, and when it fails to delineate restrictive trade practices directed at umpires?

3. Can the complaint stand when an unfair labor practice charge arising out of the same facts has been filed on behalf of petitioners with the National Labor Relations Board, the Board has issued a complaint and a hearing has been held?

Statutes Involved

The pertinent provisions of the Sherman and Clayton Acts (15 U.S.C. §§ 1, 2 and 15) are set forth in the Petition at pages 3 and 4. Also involved is Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)).

29 U.S.C. § 160 Prevention of unfair labor practices —Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any un-

fair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Statement of the Case

This action was instituted on September 23, 1969 with the filing of a complaint naming as defendants the American League of Professional Baseball Clubs; Joseph E. Cronin, individually and as President of the American League; respondent Bowie Kuhn, individually and as the Commissioner of Baseball; and attorney Paul Porter of Washington, D.C. The first cause of action alleged a claim under the Sherman and Clayton Acts, 15 U.S.C. §§ 1, 2 and 15, and sought damages against each of the defendants except Paul Porter. The second cause of action grounded on diversity, asserted a claim for defamation against all defendants. Respondent Kuhn, then the only defendant served with process, moved to dismiss the complaint for want of federal jurisdiction under the antitrust laws and lack of diversity of citizenship. The District Court granted the motion. The diversity claim has since been abandoned, leaving only the claim under the antitrust laws.

The Court of Appeals affirmed on the authority of *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), and expressed serious doubt (a) whether the complaint stated a claim even if the antitrust laws were held to be applicable, and (b) whether a federal court should consider such a claim in the face of the proceedings pending before the National Labor Relations Board.

Argument

Petitioners claim that they have been deprived of employment as baseball umpires and have suffered resulting damages by reason of the fact that respondent, the named defendants and the National League have conducted and are conducting the major leagues and organized professional baseball as an illegal agreement, combination and conspiracy in restraint of trade and as a monopoly in violation of the Sherman and Clayton Acts. Such a claim is foreclosed by decisions of this Court in *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922) and *Toolson* v. *New York Yankees, Inc., supra,* in which this Court first announced and then reaffirmed that organized baseball is not subject to the federal antitrust laws.

Petitioners do not seek to distinguish the landmark cases of *Federal Baseball* and *Toolson* or claim that the decision below is in conflict with them. Instead, petitioners ask that those decisions be overruled.

I.

Organized Baseball Does Not Fall Within the Scope of the Federal Antitrust Laws, and Therefore the District Court Had No Jurisdiction Over the Subject Matter.

Baseball was first held to be beyond the scope of the federal antitrust laws in 1922 when this Court decided *Federal Baseball.* Thirty-one years later this Court in *Toolson* affirmed baseball's exemption:

> "Congress has had the ruling [Federal Baseball] under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." 346 U.S. 356, 357.

In 1955 this Court decided two cases on the same day which further explained the rationale of *Toolson,* making it clear that if the business of organized baseball is to be brought within the scope of the federal antitrust laws, the Congress, and not the Courts, must do it. *United States* v. *Shubert,* 348 U.S. 222 (1955); *United States* v. *International Boxing Club of New York,* 348 U.S. 236 (1955).

Two years later in *Radovich* v. *National Football League,* 352 U.S. 445 (1957) this Court held the operation of professional football to be subject to the antitrust laws. The Court stated that it was limiting the rule established in *Federal Baseball* and *Toolson* to organized baseball and

that "[a]s long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in those cases." 352 U.S. at 451. Answering the argument that this would result in discrimination in favor of baseball, the Court said:

> "We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by Court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action. Of course, the doctrine of *Toolson* and *Federal Baseball* must yield to any congressional action and continues only at its sufferance. This is not a new approach." (Footnote omitted.) 352 U.S. at 452.

In the light of this judicial background, and in view of the Court's clear pronouncement in *Radovich* that "congressional processes are more accommodative" as a means of dealing with baseball's antitrust status, it is clear that this is not a situation like the one presented in *Boys Markets, Inc.* v. *Retail Clerks Union Local 770,* 398 U.S. 235 (1970), where the Court concluded: "the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision [in *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962)]" *Id.,* at 242.

Between the *Sinclair* and *Boys Markets* cases, only two bills (S. 2132 and H.R. 9059, 89th Cong., 1st Sess.) were

introduced in Congress to deal with the result of *Sinclair*. No hearings were held, no committee comment was made and no action, either in the committees or on the floor of either House, was taken. Thus, as this Court said in *Boys Markets*, there was clearly an "absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance of Sinclair . . . ." 398 U.S. at 242.

In sharp contrast is the congressional activity since *Toolson* with respect to baseball's antitrust exemption. Congress has not changed the exemption, but that has not been for lack of attention to the subject. Since 1953, over 50 bills have been introduced dealing with the status of baseball and other professional team sports under the antitrust laws. See S. Rep. No. 462, 89th Cong., 1st Sess. 1, 6 (1965). Some of these bills sought to exempt completely all professional team sports, others sought to make baseball subject to the antitrust laws on an equal basis with other professional team sports and the rest were concerned with various types of limited exemptions for team sports. Since 1957, more than eight separate hearings, totaling more than 40 days of testimony, have been held.[1] A number of bills were reported from committee during this period, accom-

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[1] See *e.g.*, *Hearings on H.R. 5307, et al., Before the Antitrust Subcomm. of the House Judiciary Comm.*, 85th Cong., 1st Sess. (1957); *Hearings on H.R. 10378 and S. 4070 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 85th Cong., 2nd Sess. (1958); *Hearings on S. 616 and S. 886 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 86th Cong., 1st Sess. (1959); *Hearings on S. 3483 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 86th Cong., 2d Sess. (1960); *Hearings on S. 950 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 89th Cong., 1st Sess. (1965).

panied by a substantial volume of committee comment.[2] Indeed, each house of Congress has passed a bill which would have continued in substance baseball's exemption and would have extended it to apply equally to other team sports,[3] but these measures were passed in separate sessions and therefore neither became law.

Therefore, Congress' failure to change the result of *Toolson* has not been because it has given little or no attention to the matter—as was the case with respect to *Sinclair*. On the contrary, baseball's antitrust exemption has continued throughout repeated and thorough congressional examination.

Moreover, no significant reliance interests were disturbed by the decision in *Boys Markets*. In baseball the reliance interests which petitioners would disturb are manifest. The growth of the business of baseball in reliance upon its exemption has been recognized by this Court and has been cited as a reason for continuing the exemption. In explaining *Toolson*, Mr. Justice Clark stated in *Radovich*:

> "Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue,

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[2] See, *e.g.*, H. R. Rep. No. 1720, 85th Cong., 2d Sess. (1958); S. Rep. No. 1620, 86th Cong., 2d Sess. (1960); S. Rep. No. 1303, 88th Cong., 2d Sess. (1964); S. Rep. No. 462, 89th Cong., 1st Sess. (1965).

[3] See S. 950, 89th Cong., 1st Sess. (1965), passed on August 31, 1965, 111 Cong. Rec. 22329 (1965); and H.R. 10378, 85th Cong., 2d Sess. (1958), amended on the floor and passed on June 24, 1958, 104 Cong. Rec. 12105 (1958).

> and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years." 352 U.S. at 450-51.

There have been 17 more years of growth and expansion of baseball, in reliance on *Toolson,* since that decision in 1953. The Petition ignores the significance which this Court has attached to such reliance and rests the petitioners' case for overruling *Toolson* exclusively on "the vast expansion of organized baseball and its huge growth of revenue derived from interstate broadcasting and other activities"* (Pet. pp. 7, 10-15). Aside from baseball's continued reliance as a reason for adhering to *Toolson,* the petitioners' argument is succinctly answered by the Court of Appeals which noted: "But the ground upon which *Toolson* rested was that Congress had no intention to bring baseball within the antitrust laws, not that baseball's activities did not sufficiently affect interstate commerce." (App. B of Petition, p. 28).

The Petition presents no new relevant facts or statutes or court decisions which furnish grounds for overruling *Toolson.*

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* The pattern of growth in baseball's broadcasting revenue and interstate activities was considered by the court in *Toolson.* See dissenting opinion of Mr. Justice Burton, 346 U.S. at 357-65.

II.

The Complaint Was Properly Dismissed Without Regard to the Applicability of the Federal Antitrust Laws to Organized Baseball.

A. *Even If the Federal Antitrust Laws Are Held to Apply to Organized Baseball, Petitioners' Complaint Fails to State a Claim Under Those Laws*

Although the dismissal of the complaint was affirmed by the Court of Appeals primarily on the authority of *Federal Baseball* and *Toolson*, there are other infirmities in the complaint which warrant its dismissal. No argument could illustrate the insufficiency of petitioners' complaint more clearly than the analysis made by the Court of Appeals:

> "Even if we were sure that professional baseball will be held subject to the antitrust laws, we would entertain serious doubt whether the complaint here stated a claim under them. Combining an assertion of general antitrust violation with a claim of injury from breach of contract or tort does not automatically make the latter a claim arising under the antitrust laws. As Judge Kaufman observed in a rather similar context, *Molinas* v. *National Basketball Ass'n*, 190 F. Supp. 241, 243 (S.D.N.Y. 1961), a plaintiff in a civil antitrust action 'must establish a clear causal connection between the violation alleged and the injuries allegedly suffered.' See also *Tepler* v. *Frick*, 204 F.2d 506 (2 Cir. 1953). Wrongful discharge of an employee does not become an antitrust violation simply because the employer is a monopolist; the private right of action is conferred only for an injury 'by reason of anything forbidden in the antitrust laws,' 15 U.S.C. § 15. Although the complaint has elaborate allegations of conspiracy in re-

> straint of trade, there is nothing to indicate restrictive trade practices directed at umpires. In the nature of things these must be employed—and discharged—by a league rather than by a single club. The only pertinent allegations going beyond discriminatory discharge by the president of the American League are that Kuhn is employed as Commissioner by both the American and the National Leagues, that plaintiffs' discharge was with Kuhn's 'knowledge, permission and consent,' and that defendants 'did, in fact, restrain and monopolize . . . trade and commerce in violation of Sections 1 and 2 of the Sherman Act by means of a group boycott against plaintiffs.' Even the requisite liberal interpretation of these allegations does not overcome the great difficulty in finding that a claim was stated under such cases as *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959), and *Fashion Originators Guild of America* v. *FTC*, 312 U. S. 457 (1941)."

Thus, even giving the requisite liberal interpretation to the petitioners' complaint, it fails to state a claim under the antitrust laws, assuming those laws were held to apply to baseball.

B. *The National Labor Relations Board Has Exclusive Jurisdiction Over the Subject Matter of This Action*

As the Court of Appeals noted, and the Petition itself confirms (p. 6), the thrust of the complaint is that petitioners were discharged by the President of the American League and denied reinstatement for the "true and only reason" that they were endeavoring to organize League umpires for collective bargaining.

The National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) provides that the National Labor Relations Board "is empowered . . . to prevent any person from engaging in

any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." The standing interpretation of this section has always been that the Board has exclusive jurisdiction over unfair labor practices. See *Garner* v. *Teamsters Union, Local 776,* 346 U.S. 485 (1953) and *S&H Grossinger, Inc.* v. *Hotel and Restaurant Employees and Bartenders International Union AFL-CIO Local 343,* 272 F. Supp. 25, 31 (S.D.N.Y. 1967).

As stated by the Court of Appeals:

> "Plaintiffs, former umpires in the American League of Professional Baseball Clubs, were discharged by the president of the League. Although he announced that this was for incompetence, plaintiffs claim 'the true and only reason' was their endeavor to organize the American League umpires for collective bargaining. Following an unfair labor practice charge on their part, the National Labor Relations Board issued a complaint under §§ 8(a)(1) and (3) of the Act, Case No. 1-CA-6581, on March 26, 1970, and this has been referred to a Trial Examiner for hearing. See 180 N.L.R.B. No. 30 (Dec. 15, 1969), 38 L.W. 2351.
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> • • • • •
>
> "Moreover, plaintiffs' real grievance is their alleged discriminatory discharge in violation of the National Labor Relations Act, and this is being considered by the agency appointed for the purpose by Congress. Even assuming this claim somehow also encompasses a violation of the antitrust laws, which is highly doubtful, we would have the further question whether a federal court could consider it once the NLRB has begun proceedings. See *Meat Cutters Local 189* v. *Jewel Tea Co.,* 381 U. S. 676 (1965); cf. *San Diego Bldg. Trades Council* v. *Garmon,* 359 U. S. 236 (1959)."

As the Court below emphasized, there are substantial questions as to the sufficiency of the complaint. With respect to the proceedings before the National Labor Relations Board adverted to by the Court of Appeals, the Board has since implemented its jurisdiction over the petitioners' claims of unfair labor practices by holding hearings thereon. Should the Board find that the facts substantiate such charges, it has the power to effect full appropriate remedial action. See Section 10(c) of the National Labor Relations Act (29 U.S.C. § 160(c)). This is not an appropriate case for the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

November 6, 1970

Respectfully submitted,

GEORGE S. LEISURE, JR.,
Attorney for Respondent.

SUPREME COURT, U.S.
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OCT 12 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

DOCKET NO. 832

ALEXANDER J. SALERNO and WILLIAM VALENTINE,
Petitioners,

against

BOWIE KUHN, individually and as the Commissioner of Baseball,
Respondent,

AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS, an unincorporated association, JOSEPH E. CRONIN individually and as President of the American League of Professional Baseball Clubs, and PAUL PORTER,
Defendants.